AMERICAN

ELECTRICAL CASES

BEING

A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPTING PATENT CASES) DECIDED IN THE STATE AND FEDERAL COURTS OF THE UNITED STATES FROM 1873 ON SUBJECTS RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC LIGHT AND POWER, ELECTRIC RAILWAY, AND ALL OTHER PRACTICAL USES OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY
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THE PEOPLE, EX REL. WILLIAM KEMMLER, Appellant, v. CHARLES F. DURSTON, AGENT AND WARDEN OF AUBURN PRISON, Respondent.

New York Court of Appeals, March 18, 1890.

(119 N. Y. 569.)

ELECTROCUTION.— CONSTITUTIONAL LAW.

The provision of the Constitution of the State of New York, viz., "Nor shall cruel and unusual punishments be inflicted" (art. 1, sec. 5), confers power upon the court to declare void legislative acts prescribing punishments for crime, which are in fact cruel and unusual.

The unconstitutionality of a law must be shown by the language of the law itself or by matters of which a court can take judicial notice. Extraneous proof cannot be used to condemn it.

It does not appear upon its face that section 505 of the Code of Criminal Procedure, as amended by laws 1888, chap. 489, which enacts that "the punishment by death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead," is in conflict with the above named constitutional provision.

While the decision by the Legislature of the question of fact, whether or not the use of electricity as an agency for producing death involves cruelty within the meaning of the constitutional provision, is binding upon the courts; and therefore the testimony taken by the court in a given case was not available to impeach the validity of the legislation; yet it contained a valuable collection of facts, available as argument, and quite conclusive that electrocution results in instantaneous and painless death.

APPEAL from order of General Term of the Supreme Court, Fifth Judicial Department, which affirmed an order of the county judge of Cayuga county, dismissing a writ of habeas corpus.

Facts stated in opinion.

W. Burke Cochran, for appellant.

Charles F. Tabor, attorney-general, for respondent.

O'BRIEN, J.: The respondent is the agent and warden of the State prison at Auburn, and the relator, being in his custody, applied for a writ of habeas corpus to inquire into the cause of detention, which was made returnable by the officer granting it before the county judge of Cayuga county. The relator, in his petition for the writ, stated that the cause or pretense of the imprisonment complained of was that after his indictment and trial for the crime of murder in the first degree, and his conviction thereof in the Court of Oyer and Terminer, he was sentenced by that court to undergo a cruel and unusual punishment for that crime, contrary to the Constitution of this State and of the United States, and was threatened with deprivation of life without due process of law, by reason of such illegal sentence and judgment of the court. The writ was duly served upon the respondent, who made return thereto that he detained the relator in his custody as agent and warden of the prison by virtue of the judgment of the Court of Oyer and Terminer held in the county of Erie, whereby the relator was duly convicted of the crime of murder in the first degree, and also by virtue of a warrant duly delivered to him under the hand and seal of a justice of the Supreme Court presiding at the said Court of Oyer and Terminer where the relator was convicted, which recited the indictment, trial, conviction and sentence of the relator, and directed the respondent to carry the same into effect in these words:

Now, therefore, you are hereby ordered, commanded and required to execute said sentence, upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State prison, or within the yard or inclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient inten-

sity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead.

This command and direction to the warden was in accordance with the sentence actually passed upon the relator after conviction, in these words:

The sentence of the court is that within a week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State prison, or within the yard or inclosure adjoining thereto, the defendant suffer the punishment of death to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure of the State of New York, and that in the meantime the defendant be removed to, and until the infliction of such punishment be kept in solitary confinement in, said Auburn State prison.

On the return day of the writ the relator and the respondent appeared by counsel before the county judge, and by agreement of counsel the production of the relator, pursuant to the command of the writ, was waived. Counsel for the relator then offered to prove that the infliction of the penalty named in the sentence, namely, death by the application of electricity, is a cruel and unusual punishment within the meaning of the Constitution, and cannot, therefore, be lawfully inflicted. The attorney-general objected, on the ground that the court had no authority to take proof in regard to the constitutionality of the statute. This objection was overruled by the county judge, and the counsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer.

In this way a mass of testimony was given upon both sides, certified by the referee to the county judge and embraced in the extended record before us. The result was that after a hearing upon the report of the referee the county judge dismissed the writ and remanded the relator to the custody of the respondent. When it appeared, from the return of the respondent, that he retained the relator in custody under and by virtue of the judgment of a court of

competent jurisdiction wherein the relator was convicted of murder, it was the duty of the county judge to dismiss the writ and remand the relator to the custody of the agent and warden of the prison, unless it could be shown that the Court of Oyer and Terminer was without jurisdiction to pass the sentence, which it did. *People ex rel* v. *Warden, etc.*, 100 N. Y. 20; *People ex rel.* v. *Liscomb*, 60 id. 559.

It is not denied that the court had such jurisdiction providing that the Legislature had power under the Constitution to enact chapter 489 of the laws of 1888, entitled "An act to amend sections 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of Criminal Procedure, in relation to the infliction of the death penalty, and to provide means for the infliction of such penalty." Prior to the passage of this statute the punishment by death in every case was to be inflicted by hanging the convict by the neck until he was dead. This provision of law was changed by the amendments of the code above referred to, and now the section (505) reads as follows:

> The punishment by death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. (Const., art. 1, sec. 5.) This provision was borrowed from the English statute passed in the first year of the reign of William and Mary, being chapter 2 of the statutes of that year, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," usually known as the Bill of Rights. It enacts, among other things, that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." When this statute was made part of the Constitution of the United States, the word "shall" was substituted for the word "ought," and

in this form it first appears in the Constitution of this State adopted in 1846. It is not very clear whether the provision as it stands in our Constitution was intended as an admonition to the Legislature and the judiciary, or as a restraint upon legislation inflicting punishment for criminal offences. When the statute referred to was enacted in England it was not intended as a check upon the power of parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country, as is shown by the fact that for more than half a century after it appeared on the statute book, a long catalogue of offences were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed. 2 Blackstone's Comm., chap. 33, p. 440.

The history of the times in which this provision assumed the form of a law, shows that it was, after all, intended to be little more than a declaration of the rights of the subject. The English people were about to place upon the throne made vacant by revolution, a foreign prince, whose life had been spent in military pursuits, rather than in the study of constitutional principles and the limitations of power, as then understood in the country he was to govern. This was considered a favorable opportunity to enact, in the solemn form of a statute, a declaration of the principles upon which the people desired the government to be conducted; but whatever the purpose of the statute was in the country where it originated, we think that its presence in the Constitution of this State confers power upon the courts to declare void legislative acts prescribing punishments for crime, in fact cruel and unusual. This is the power that is invoked against the amendments to the Code of Criminal Procedure above referred to by the learned counsel for the relator, in an argument addressed to us, interesting on account of its great political and scientific research. We entertain no doubt in regard to the power of the Legislature to change the manner of inflicting the

penalty of death. The general power of the Legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendments prescribed no new punishment for the offence. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered in this age some degree of cruelty, and it is resorted to only because it is deemed necessary for the protection of society. The act on its face does not provide for any other or additional punishment.

In behalf of the relator, this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and, when carried to its logical results, would prohibit the enforcement of the death penalty at all. Every act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear. *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 666, 668; *People, ex rel.* v. *Briggs*, 50 id. 553, 558; *People* v. *Home Ins. Co.*, 92 id. 328, 344; *People, ex rel.* v. *Albertson*, 55 id. 50, 54; *People* v. *Gillson*, 109 id. 389, 397; *People* v. *King*, 110 id. 418.

If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature, some provision of the Constitution may possibly be violated. *People* v. *Albertson*, *supra*; *People* v. *Draper*, 15 N. Y. 532; *Matter of N. Y. E. R. R. Co.*, 70 id. 327.

If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now

considering may very properly be referred to to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the Legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the law makers, when that can be done without violating any constitutional provision. *People* v. *Supervisors*, 43 N. Y. 130. Chapter 352 of the laws of 1886, entitled "An act to authorize the appointment of a commission to investigate and report to the Legislature the most humane and approved method of carrying into effect the sentence of death in capital cases," provided for the appointment of a commission consisting of three eminent citizens, who were named therein, and required them to investigate and report to the Legislature on or before the fourth Tuesday of January, 1887, the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases. To enable this commission to make its investigation most thorough, the Legislature extended the time for it to report for a year longer by chapter 7 of the laws of 1887. This commission early in the legislative session of 1888 made its report, accompanied with a proposed bill which the Legislature afterward and during the same session enacted, and this is the statute which is now attacked in behalf of the relator an an unauthorized expression of the legislative will. The Legislature proceeded to change the mode of executing the sentence of death with care and caution and unusual deliberation. It would be a strange result indeed if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in capital cases, have culminated in the enactment of a law in confiict with the provisions of the Constitution prohibiting cruel and unusual punishments. Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was a question for the determination of the Legislature. It was a question peculiarly

within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court. The determination of the Legislature of this question is conclusive upon this court. The amendment to the Code of Criminal Procedure changing the mode of inflicting the death penalty, does not, upon its face, nor in its general purpose and intent, violate any provision of the Constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death and for that reason as part of the argument for the relator, but nothing more. We have examined this testimony, and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the statute, must result in instantaneous and consequently in painless death.

The order appealed from should be affirmed.

All concur.

Order affirmed.

NOTE.— In *People* v. *Kemmler*, (119 N. Y. 580) decided by the same court and at the same time as the foregoing, the case being upon appeal from the judgment of conviction, Mr. Justice GRAY, writing the opinion of the court, says: "A last point is made on this record, and that is, that the sentence imposed is illegal and unconstitutional, as being a cruel and unusual punishment. As that is the subject of review upon another record, and will be discussed by another member of this court, I shall not stop to consider it here. I may add, however, that I think the point untenable. Punishment by death, in a general sense, is cruel; but as it is authorized and justified by a law, adopted by the people as a means to the end of the better security of society, it is not cruel within the sense and

meaning of the Constitution. The infliction of the death penalty through a new agency is, of course, unusual; but as death is intended as the immediate sequence of the mechanical operation prescribed, it is not unusual in the sense that some certainly prolonged or torturous procedure would be understood to be. In my judgment, we should assume that the enactment of the Legislature was based upon some investigation of facts, and where the declared purpose and end of the law are the infliction of death upon the offender, we may not say, upon a ground work of impossibilities and guess work, that it is, in any sense, an unconstitutional act, because a new mode is adopted to bring about the death."

The history of the New York electrocution law, and of this celebrated Kemmler case, in its progress through the courts, is quite fully presented in the following opinion of the Supreme Court of the United States, to which final resort was made in behalf of the prisoner.

IN RE KEMMLER, Petitioner.

United States Supreme Court, May 23, 1890.

(136 U. S. 436.)

ELECTROCUTION.— CONSTITUTIONAL LAW.

The eighth amendment to the Federal Constitution, which prohibits the infliction of cruel and unusual punishments, does not apply to the States, but only to the national government.

The fourteenth amendment, which forbids any State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is not infringed by the New York statute which provides that capital punishment shall be inflicted by electricity.

Said statute is limited to punishment for crimes committed after its taking effect, and therefore is not repugnant to the provision of the Federal Constitution which prohibits the passage of *ex post facto* laws.

ON petition for an original writ of *habeas corpus*. The facts and history of the case are set forth in the opinion.

Roger M. Sherman, for petitioner.

Charles F. Tabor, attorney-general of the State of New York, opposing.

Chief Justice FULLER delivered the opinion of the court: This is an application for a writ of error to bring up for review a judgment of the Supreme Court of the State of New York, affirming an order of the county judge of Cayuga county, remanding the relator to the custody of the warden of the State prison at Auburn, upon a hearing upon *habeas corpus*. The judgment of the Supreme Court was entered upon a judgment of the Court of Appeals of the State of New York, affirming a previous order of the Supreme Court. The application was originally presented to Mr. Justice BLATCHFORD, and, upon his suggestion, was permitted to be made in open court, and has been heard upon full argument.

A writ of error to the highest court of a State is not allowed as of right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment. *Spies* v. *Illinois*, 123 U. S. 131.

The writ of *habeas corpus* was allowed on the 11th day of June, 1889, and made returnable before the county judge of Cayuga county. The petition was filed by one Hatch, and stated "that William Kemmler, otherwise called John Hort, is imprisoned, or restrained in his liberty, at Auburn State Prison, in the city of Auburn, county of Cayuga, State of New York, by Charles F. Durston, agent and warden of Auburn State Prison, having charge thereof. That he has not been committed and is not detained by virtue of any judgment, decree, final order or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for contempt; or by virtue of an exe-

cution or other process issued upon such a judgment, decree or final order. That the cause or pretence of the imprisonment or restraint of said William Kemmler, otherwise called John Hort, according to the best knowledge and belief of your petitioner, is that he was indicted by a grand jury of Erie county for murder in the first decree; that he was tried therefor at a Court of Oyer and Terminer of Erie county, and found guilty thereof by the verdict of a jury on the 10th day of May, 1889; that thereafter and on the 14th day of May, 1889, he was arraigned in said Court of Oyer and Terminer for sentence; that, contrary to the Constitution of the State of New York and of the United States, and contrary to his objection and exception, duly and timely taken in due form of law, he was sentenced to undergo a cruel and unusual punishment, as appears by a copy of the pretended judgment, warrant or mandate hereto annexed, and made a part of this petition, and marked Exhibit 'A,' by virtue of which such imprisonment or restraint is claimed to be made; that he is deprived of liberty and threatened with deprivation of life without due process of law, contrary to the Constitutions of the State of New York and of the United States, and contrary to his objection and exception thereto, duly and timely taken. The imprisonment is stated to be illegal because it is contrary to the provisions of each of said Constitutions."

The warden of the Auburn State Prison made the following return:

"*First.* That I am the duly appointed and acting warden and agent of the Auburn State Prison, and on the said 11th day of June, 1889, and before the said writ of *habeas corpus* was served upon and came to me, the said William Kemmler, otherwise called John Hort, was and now is in my custody and detained by me in the State Prison at Auburn, in the State of New York, under and by virtue of a judgment of the Court of Oyer and Terminer of the State of New York, held in and for the county of Erie, on the 14th day of May, 1889, duly convicting the said William Kemmler, otherwise called John Hort, of

murder in the first degree. A true copy of the judgment roll of the aforesaid conviction is hereto attached as a part hereof, and marked Exhibit 'A.'

"And said William Kemmler, otherwise called John Hort, is also detained in my custody as such warden and agent under and by virtue of a warrant signed by the Hon. Henry A. Childs, the justice of the Supreme Court before whom the said William Kemmler, otherwise called John Hort, was, as aforesaid, duly tried and convicted, and which said warrant was duly issued in pursuance of the aforesaid conviction, and in compliance with the provisions of the Code of Criminal Procedure relating thereto, a copy of which said warrant is hereto annexed as a part hereof, and marked Exhibit 'B.'

"*Second.* And I, the said Charles F. Durston, agent and warden of Auburn State Prison, do make and further return and allege as I am advised and verily believe to be true, that the said William Kemmler, otherwise called John Hort, was not sentenced as hereinbefore set forth to undergo a cruel and unusual punishment, contrary to the provisions of the Constitution of the State of New York and the Constitution of the United States.

"And I do further allege that the said imprisoment and restraint of the said William Kemmler, otherwise called John Hort, and the deprivation of his liberty and the threatened deprivation of life, are not without due process of law and are not contrary to the provisions of the Constitution of the State of New York or the Constitution of the United States, as alleged in the petition upon which said writ of *habeas corpus* was granted.

"I do further allege, as I am advised, that the said judgment of conviction hereinbefore set forth, and the aforesaid warrant and the punishment and deprivation of liberty and the threatened deprivation of life of the said William Kemmler, otherwise called John Hort, thereunder, are fully warranted by the provisions of chapter 489 of the Laws of 1888, which is a valid enactment of the Legislature of the State of New York, and it is not in conflict with or in

violation of the provisions of the Constitution of the State of New York or the Constitution of the United States.

"And I hold the said William Kemmler, otherwise called John Hort, under and by virtue of no other authority than as hereinbefore set forth."

Copies of the indictment of Kemmler, otherwise called Hort, for the murder of Matilda Zeigler, otherwise called Matilda Hort; the judgment and sentence of the court; and the warrant to the warden to execute the sentence, were attached to the petition and return. The conclusion of the warrant, pursuing the sentence, was in these words: "Now, therefore, you are hereby ordered, commanded and required to execute the said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead."

Upon the return of the writ before the county judge, counsel for the petitioner offered to prove that the infliction of death by the application of electricity as directed "is a cruel and unusual punishment, within the meaning of the Constitution, and that it cannot, therefore, be lawfully inflicted, and to establish the facts upon which the court can pass, as to the character of the penalty. The attorney-general objected to the taking of testimony as to the constitutionality of this law, on the ground that the court has no authority to take such proof. The objection was thereupon overruled, and the attorney-general excepted." A voluminous mass of evidence was then taken as to the effect of electricity as an agent of death. And upon that evidence it was argued that the punishment in that form was cruel

and unusual within the inhibition of the Constitutions of the United States and of the State of New York, and that therefore the act in question was unconstitutional.

The county judge observed that the "Constitution of the United States and that of the State of New York, in language almost identical, provide against cruel and inhuman punishment, but it may be remarked, in passing, that with the former we have no present concern, as the prohibition therein contained has no reference to punishments inflicted in State courts for crimes against the State, but is addressed solely to the national government and operates as a restriction on its power." He held that the presumption of constitutionality had not been overcome by the prisoner, because he had not "made it appear by proofs or otherwise, beyond doubt, that the statute of 1888 in regard to the infliction of the death penalty provides a cruel and unusual, and therefore unconstitutional punishment, and that a force of electricity to kill any human subject with celerity and certainty, when scientifically applied, cannot be generated." He, therefore, made an order dismissing the writ of *habeas corpus*, and remanding the relator to the custody of the respondent. From this order an appeal was taken to the Supreme Court, which affirmed the judgment of the county judge. The Supreme Court was of opinion (*People, &c.* v. *Durston, Warden, &c.*, 55 Hun, 64), that it was not competent to support the contention of the relator by proofs *aliunde* the statute; that there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of a court is superior to that of the Legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the Legislature could be reviewed by the court; and that the presumption that the Legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment, was conclusive upon the court. And

DWIGHT, J., delivering the opinion, also said: "We have read with much interest the evidence returned to the county judge, and we agree with him that the burden of the proof is not successfully borne by the relator. On the contrary, we think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless death."

From this judgment of the Supreme Court an appeal was prosecuted to the Court of Appeals, and the order appealed from was affirmed. It was said for the court by O'BRIEN, J.: "The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. * * * If it cannot be made to appear that a law is in conflict with the Constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated." The determination of the Legislature that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was held conclusive. The opinion concludes as follows:

"We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless death." At the same term of the Court of Appeals the appeal of the relator

from the judgment on the indictment against him was heard, and that judgment affirmed. Among other points made upon that appeal was this, that the sentence imposed was illegal and unconstitutional, as being a cruel and unusual punishment, but the court decided, as in the case of the appeal from the order under consideration here, that the position was untenable, and that the act was not unconstitutional because of the new mode adopted to bring about death.

We find, then, the law held constitutional by the Court of Oyer and Terminer in rendering the original judgment; by the Supreme Court and the Court of Appeals in affirming it; by the county judge in the proceedings upon the writ of *habeas corpus;* by the Supreme Court in affirming the order of the county judge and by the Court of Appeals in affirming that judgment of the Supreme Court.

It appears that the first step which led to the enactment of the law was a statement contained in the annual message of the governor of the State of New York, transmitted to the Legislature, January 6, 1885, as follows: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the Legislature." The Legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the laws of 1888. Laws of New York, 1888, 778. Among other changes, section 505 of the Code of Criminal Procedure of New York was amended so as to read as follows: "Section 505. The punishment of death must, in every case, be inflicted by causing to pass

through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead." Various other amendments were made, not necessary to be considered here.

Sections 10, 11 and 12 of the act are as follows:

"Sec. 10. Nothing contained in any provision of this act applies to a crime committed at any time before the day when this act takes effect. Such crime must be punished according to the provisions of law existing when it is committed, in the same manner as if this act had not been passed; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this act, are continued in existence, and applicable to all crimes punishable by death, which have been or may be committed before the time when this act takes effect. A crime punishable by death committed after the beginning of the day when this act takes effect, must be punished according to the provisions of this act, and not otherwise.

"Sec. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"Sec. 12. This act shall take effect on the first day of January, one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death, committed on or after that date."

Kemmler was indicted for and convicted of a murder committed on the 29th day of March, 1889, and therefore came within the statute. The inhibition of the Federal Constitution upon the passage of *ex post facto* laws has no application.

Section 5 of article 1 of the Constitution of the State of New York provides that "excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." The eighth amendment to the Federal Constitution reads thus: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted." By the fourteenth amendment it is provided that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is not contended, as it could not be, that the eighth amendment was intended to apply to the States, but it is urged that the provision of the fourteenth amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term "due process of law."

The provision in reference to cruel and unusual punishments was taken from the well-known act of parliament of 1688, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," in which, after rehearsing various grounds of grievance, and among others, that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted," it is declared that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."* Stat. 1 W. &. M., c. 2. This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the Constitution of the State of New York was intended particularly

*NOTE *by the court.*— In the "Body of the Liberties of the Massachusetts Colony in New England," of 1641, this language is used: "For bodilie punishments we allow amongst us none that are inhumane, barbarous or cruel." Colonial Laws of Massachusetts (1889), p. 43.

to operate upon the Legislature of the State, to whose control the punishment of crime was almost wholly confided. So that if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the eighth amendment, in its application to Congress.

In *Wilkerson* v. *Utah*, 99 U. S. 130, 135, Mr. Justice CLIFFORD, in delivering the opinion of the court, referring to Blackstone, said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision, which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the Legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the Legislature was possessed of the facts upon which it took action; and that by evidence taken *aliunde* the statute that the presumption could not be overthrown. They went further, and expressed the opinion that upon the evidence the Legislature had attained by the act the object had in view in its passage.

The decision of the State courts sustaining the validity of the act under the State Constitution is not re-examinable here, nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States.

Treating it as involving an adjudication that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein.

The fourteenth amendment did not radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of the State. Protection to life, liberty and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachments by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges of citizens of the States are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542; *Slaughterhouse Cases*, 16 Wall. 36.

In *Hurtado* v. *California*, 110 U. S. 516, 534, it is pointed out by Mr. Justice MATTHEWS, speaking for the court, that the words "due process of law," as used in the fifth amendment, cannot be regarded as superfluous, and held to include the matters specifically enumerated in that article, and that when the same phrase was employed in the fourteenth amendment, it was used in the same sense, and with no greater extent.

As due process of law in the fifth amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within

the limits therein prescribed, and interpreted according to the principles of the common law, so, in the fourteenth amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. *Barbier* v. *Connolly*, 113 U. S. 27, 31.

The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and the Legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York, we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we can not do upon the record before us.

The application for a writ of error is

Denied.

NOTE.— See note to preceding case.